

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

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In the Matter of	)	
	)	
Communications Assistance	)	CC Docket No. 97-213
For Law Enforcement Act:	)	
Extension of October 1998	)	
Compliance Date	)	

FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

**REPLY COMMENTS OF THE**  
**CENTER FOR DEMOCRACY AND TECHNOLOGY**

**INTRODUCTION**

The comments of the Federal Bureau of Investigation ("FBI") and the Department of Justice ("DOJ") on the CALEA compliance date only serve to reinforce the two choices currently facing the Commission. As outlined by CDT in its petition and initial comments in this proceeding, the Commission can either delay implementation of CALEA while it decides what is within and outside the scope of the Act or, alternatively, it can order carriers to begin immediate implementation, given an appropriate lead time, of the interim standard *minus* the two contested points raised by CDT and minus the punch list sought by the FBI.

The FBI and DOJ's comments make clear that to do what they propose -- to require carriers to implement the full J-STD-025 standard immediately, and then decide the question of what CALEA requires -- would irreversibly prejudice the outcome of the Commission's consideration of the substantive issues raised in this docket and noticed for comment in the next phase. Even the FBI and DOJ's own comments acknowledge the irreparable harm to the privacy interests of the American public if the Commission were to adopt such an approach. According

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to the FBI and DOJ, even if the Commission later finds that the interim standard violates the Act, carriers that implement the interim standard would later “have the option of discontinuing some law enforcement assistance capabilities” but would “not be required to remove” those capabilities that the Commission has nonetheless found go beyond the mandate of CALEA. Comments of the Federal Bureau of Investigation and the Department of Justice, Docket No. 97-213, ¶ 30 (filed May 8, 1998) (“FBI/DOJ Comments”) (emphasis in original). In this way, the FBI and DOJ would ensure that the challenged and potentially unlawful aspects of the J-STD-25 standard would be locked in place, for no carrier, having paid once to install unnecessary capabilities, would pay a second time to remove them. Moreover, once the unnecessary capabilities were in place, carriers would be compelled to make them available to law enforcement under the ordinary assistance requirements of 18 U.S.C. §§ 2518(4) and 3124.

The FBI and DOJ’s comments also make clear that if the Commission does not act on its own to grant extensions or otherwise set a reasonable time for compliance, the FBI and DOJ, through a contrived “forbearance” authority that finds no basis in the Act, will use the deadline as a Sword of Damocles to force imposition of its punch list. As the FBI and DOJ cynically argue, the Commission need not extend the compliance date, since they can do so themselves through agreements to forbear from CALEA enforcement -- but only with those carriers that agree to adopt the full interim standard *and* the disputed FBI punch list.

The FBI and DOJ thus demonstrate what CDT has urged in its petition and comments -- that the deadline issue is tied inextricably to the privacy issue. The FBI and DOJ seek to wrest authority to extend CALEA compliance from this Commission with the hope of putting in place their own interpretation of what Section 103 of the Act requires. It is for this precise reason that

the Commission should reject the FBI and DOJ's position, and why extension of the compliance date is required. Unless the Commission suspends compliance while it decides what is in and what is outside the scope of CALEA, the FBI and DOJ will use their promise of forbearance from enforcement to force carriers to install capabilities that may not be required by the Act. Whatever it does, the Commission should avoid giving the FBI the authority to use the impending deadline to determine what the substantive requirements of CALEA mean. Congress clearly intended to withhold that authority from the FBI, and instead granted it to this Commission and the courts.

### **DISCUSSION**

#### **A. The Commission Should Reject the FBI and DOJ's Attempt to Assume unto Themselves an Invented "Forbearance" Authority to Extend the CALEA Compliance Date, and to Use that Authority as a Means of Deciding What is Within the Scope of CALEA**

The FBI and DOJ admit in their comments that some extension of the CALEA compliance date is necessary. FBI/DOJ Comments at ¶ 31. However, contrary to the statute, the FBI and DOJ want to assume for themselves the authority to determine which carriers are entitled to extensions and how long any extensions should be. They argue that this Commission, which clearly has authority to grant extensions to each and every carrier under express provisions of CALEA, has no power to recognize on the basis of the factual record before it the industry-wide impossibility of meeting the October deadline and to grant all carriers the same extension. FBI/DOJ Comments at ¶¶ 21, 34. But the FBI and DOJ then claim that *they* should have the authority to set compliance deadlines for any and all carriers through a "forbearance" procedure that has absolutely no foundation in the statute. FBI/DOJ Comments at ¶¶ 31-33.

Moreover, the FBI would use the non-statutory “forbearance” authority to assume unto itself the authority that Congress specifically denied it – to determine what CALEA requires – by granting extensions to only those carriers who accept the entire interim standard and the FBI punch list now in dispute in this very proceeding. *See* FBI/DOJ Comments at Attachment B (Letter from Stephen R. Colgate, Assistant Attorney General for Administration, to Tom Barba, dated Feb. 3, 1998) (“Colgate Letter”). The Colgate Letter makes clear that the FBI and DOJ will grant “forbearance” to carriers who commit to include the “CALEA capability requirements,” which the letter defines as “the TIA interim standard J-STD-025 and the first nine punch list capabilities.”<sup>1</sup> Colgate Letter at 4.

In essence, the FBI and DOJ are proposing to take away from this Commission not only the authority to grant deadline extensions but also the authority to resolve disputes over the scope and meaning of the Section 103 capability assistance requirements. In the name of faithfulness to Congress’ effective date, the FBI and DOJ ask this Commission to transfer control over both the timing and the substance of CALEA compliance.

The FBI and DOJ complain about the prospect of this Commission delaying the effective date by using authority given to the Commission by Congress, in express anticipation of the very situation the industry now faces. It could not be clearer that the FBI’s effort to seize control of CALEA’s implementation and to assume unto itself the role of final arbiter of the Act’s requirements is precisely the result that Congress sought to avoid. The government’s attempt to use its enforcement authority under Section 108, not only to extend the deadline for compliance but as a lever over what is within and beyond the scope of CALEA, completely undermines the

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<sup>1</sup> Beyond the fact that this forbearance authority finds no basis in CALEA, its implementation and exercise by the FBI and DOJ also raise questions under the Administrative Procedures Act, as well.

Act's carefully crafted balance among the roles of industry, law enforcement, the Commission, the courts, and the public.

**B. An Indefinite Extension of the Compliance Date at this Time Offers the Best Hope for Logical Consideration of the Issues**

The FBI and DOJ complain that CDT has proposed an indefinite extension of the compliance date (FBI/DOJ Comments at ¶ 5), yet their comments do not indicate how long an extension they believe would be appropriate under the "forbearance" scheme nor do they even propose any logical criteria that would be applied in setting the new deadlines for carriers who agree to the punch list. In the Colgate letter, the DOJ only indicated that an extension would be granted up to the date of the "first currently scheduled software generic product release after the October 25, 1998" deadline. Colgate Letter at 5. In some cases, this would clearly be too little, while in other cases it could be quite lengthy.

Contrary to the FBI and DOJ characterization, CDT in its comments laid out a logical procedure for the Commission to follow in determining what length of extensions are appropriate: first decide the scope of the Act, then adopt a standard, then set a compliance date based on the contents of the standard. This is precisely the procedure Congress set up in Section 107(b), and it is a logical approach for the Commission to adopt in this proceeding.

**C. Recent Evidence Contradicts the FBI and DOJ's Claims that Extension of the Compliance Date Will Adversely Affect Law Enforcement**

The FBI and DOJ argue that delay in CALEA implementation would have "severe repercussions for the public interest in effective law enforcement." FBI/DOJ Comments at ¶ 34. Specifically, they claim that "[a]ny delay in the effective date of §103's assistance capability

obligations would mean a prolonged period during which law enforcement officers will be severely handicapped in their ability to fight crime through effective electronic surveillance.” *Id.*

This appeal to the dire consequences that would flow from a more judicious and balanced approach to CALEA implementation is undercut in at least three major ways:

(1) The government itself is offering to delay the effective date of the statute through the forbearance procedure that it has created out of whole cloth. There is no reason to believe that delays negotiated by the FBI under the forbearance process would be any shorter than the delays granted by the Commission.

(2) Electronic surveillance has shown no decrease since CALEA was enacted. While FBI and carriers have argued over the standard, the number of wiretaps and the average number of intercepted communications has increased, according to the latest statistics from the Administrative Office of the U.S. Courts. Last year, more wiretaps were installed than in any year before with the exception of 1994 -- and the number of wiretaps installed last year was essentially the same as it was in the year CALEA was enacted (1094 installed in 1997 versus 1100 installed in 1994). The average number of calls intercepted per wiretap last year was also higher than in any other year except 1994.

Meanwhile, the number of national security wiretaps has also been increasing. Adding together law enforcement wiretaps and national security wiretaps, the number of wiretaps authorized last year was at least 20% higher than the year CALEA was enacted. These statistics contradict the FBI and DOJ's claims that new technologies are drastically interfering with surveillance.

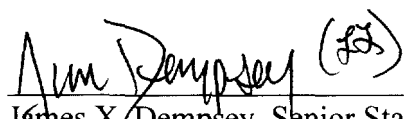
(3) The FBI itself delayed for over three years promulgation of CALEA capacity requirements. Due to delay that was solely in the control of the FBI, these capacity requirements, issued in purportedly final form in March of this year (but still requiring clarification and interpretation), do not take effect until the year 2001, beyond what even industry has requested in terms of extension of the capability assistance requirements.

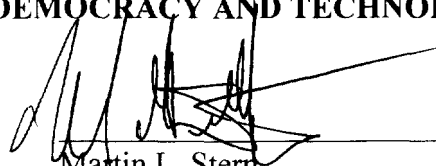
### CONCLUSION

At bottom, CALEA compliance solutions are not available presently and will not be available on October 25, or anytime soon thereafter. There is a simple reason for this: industry and FBI cannot agree on what CALEA requires, so no one is building compliance solutions with any commitment. Overall, industry and law enforcement took the wrong path by putting so much effort into a standard that includes so many items not required by CALEA. Two of these items clearly infringe on privacy. But the standard itself is not the point. The central issue is, what does CALEA require? Until that is decided, compliance cannot go forward, with or without a standard.

Respectfully submitted,

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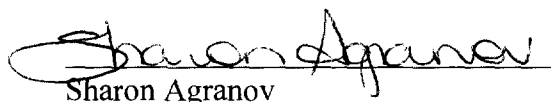
  
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I, Sharon Agranov, do hereby certify that copies of the Reply Comments for the Center for Democracy and Technology have been served on the persons listed below via first class mail delivery on this 15th day of May, 1998.

  
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